

1 On May 24, 2005, the court received a petition for writ of habeas corpus from
 2 petitioner and docketed it as 3:05-cv-00308-PMP-RAM. The court dismissed the petition without
 3 prejudice on February 17, 2006, for lack of exhaustion.

4 On November 9, 2007, petitioner filed a petition for writ of habeas corpus (post-
 5 conviction) in the state district court. Exhibit 18. The court appointed counsel to represent
 6 petitioner. Exhibit 19. The state filed a motion to dismiss on January 15, 2008. *See* Exhibit 20.
 7 The district court held an evidentiary hearing on November 3, 2008. Exhibit 25. The district court
 8 held that all of the claims raised in the petition were without merit, and that petitioner did not make a
 9 timely request of counsel to lodge an appeal. *Id.*

10 Petitioner filed an appeal to Nevada Supreme Court on February 5, 2009. Exhibit 27.
 11 Petitioner claim that the district court erred in finding his counsel was effective, because she failed to
 12 file a direct appeal. *Id.* at 5. On November 13, 2009, the Nevada Supreme Court affirmed the denial
 13 of petitioner's state petition. Exhibit 32. In so doing, the court wrote in part:

14 Garcia filed his habeas petition more than three years after the entry of
 15 his judgment of conviction. Thus, Garcia's petition was untimely filed
 16 and procedurally barred absent a demonstration of good cause for the
 17 delay and prejudice. *See* NRS 34.726(1) . . . [W] conclude that the
 district court should have granted the State's motion to dismiss
 Garcia's petition on procedural grounds alone.

18 *Id.* at 2.

19 This court received the present petition on December 11, 2009, raising three grounds
 20 for relief. Docket #1. Respondents now move to dismiss the petition on several grounds. (Docket
 #9.) Petitioner opposes the motion. (Docket #12.)

21 LEGAL STANDARDS

22 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty
 23 Act of 1996 ("AEDPA"), which applies to all petitions for writ of habeas corpus filed after its
 24 enactment. *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997), *cert. denied*, 522 U.S.
 25 1008, 118 S.Ct. 586 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir. 1997) (quoting *Drinkard*
 26 *v. Johnson*, 97 F.3d 751, 769 (5th Cir.1996), *cert. denied*, 520 U.S. 1107, 117 S.Ct. 1114 (1997),

1 *overruled on other grounds by Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059 (1997) (holding
2 AEDPA only applicable to cases filed after statute's enactment). The instant petition was filed after
3 the enactment of the AEDPA, thus it is governed by its provisions.

4 This court may entertain a petition for writ of habeas corpus “in behalf of a person in
5 custody pursuant to the judgment of a State court only on the ground that he is in custody in violation
6 of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

7 The AEDPA altered the standard of review that a federal habeas court must apply
8 with respect to a state prisoner's claim that was adjudicated on the merits in state court. *Williams v.*
9 *Taylor*, 120 S.Ct. 1495, 1518-23 (2000). Under the AEDPA, an application for habeas corpus will
10 not be granted unless the adjudication of the claim “resulted in a decision that was contrary to, or
11 involved an unreasonable application of, clearly established Federal law, as determined by the
12 Supreme Court of the United States,” or “resulted in a decision that was based on an unreasonable
13 determination of the facts in light of the evidence presented in the State Court proceeding.” 28
14 U.S.C. § 2254(d); *Lockyer v. Andrade*, 123 S.Ct. 1166, 1173 (2003) (disapproving of the Ninth
15 Circuit’s approach in *Van Tran v. Lindsey*, 212 F.3d 1143 (9th Cir. 2000)); *Williams v. Taylor*, 120
16 S.Ct. 1495, 1523 (2000). “A federal habeas court may not issue the writ simply because that court
17 concludes in its independent judgment that the relevant state-court decision applied clearly
18 established federal law erroneously or incorrectly.” *Lockyer*, at 1174 (citations omitted). “Rather,
19 that application must be objectively unreasonable.” *Id.* (citations omitted).

20 While habeas corpus relief is an important instrument to assure that individuals are
21 constitutionally protected, *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-3392 (1983);
22 *Harris v. Nelson*, 394 U.S. 286, 290, 89 S.Ct. 1082, 1086 (1969), direct review of a criminal
23 conviction is the primary method for a petitioner to challenge that conviction. *Brecht v.*
24 *Abrahamson*, 507 U.S. 619, 633, 113 S.Ct. 1710, 1719 (1993). In addition, the state court’s factual
25 determinations must be presumed correct, and the federal court must accept all factual findings made
26 by the state court unless the petitioner can rebut “the presumption of correctness by clear and

convincing evidence.” 28 U.S.C. § 2254(e)(1); *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769 (1995); *Thompson v. Keohane*, 516 U.S. 99, 116 S.Ct. 457 (1995); *Langford v. Day*, 110 F.3d 1380, 1388 (9th Cir. 1997).

DISCUSSION

Respondents move to dismiss grounds one and two on the ground that they are unexhausted. In ground one, petitioner claims that his sentence is excessive under Nev. Rev. Stat. 193.330. (Docket #7 at 3.) In ground two, petitioner claims that a utility knife is not a “deadly weapon” pursuant to Nev. Rev. Stat. 193.165, and his sentence enhancement is thus unlawful. *Id.* at 5.

A petitioner who is in state custody and wishes to collaterally challenge his conviction by a petition for writ of habeas corpus must exhaust state judicial remedies. 28 U.S.C. § 2254(b)(1). The exhaustion doctrine is based on comity to the state court and gives the state court the initial opportunity to correct the state's alleged constitutional deprivations. *Coleman v. Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55 (1991); *Rose v. Lundy*, 455 U.S. 509, 518, 102 S.Ct. 1198, 1203 (1982); *Buffalo v. Sunn*, 854 F.2d 1158, 1163 (9th Cir. 1988).

A petitioner can satisfy the exhaustion requirement by providing the highest state court with “a full and fair opportunity to consider and resolve the federal claims.” *Sandgathe v. Maass*, 314 F.3d 371, 371 (9th Cir. 2002), citing *Duncan v. Henry*, 513 U.S. 364, 365, 115 S.Ct. 887, 888 (1995). A federal court will find that the highest state court was given a full and fair opportunity to hear a claim if the petitioner has presented the highest state court with the claim's factual and legal basis. *Duncan v. Henry*, 513 U.S. at 365, 115 S.Ct. at 888 (legal basis); *Kenney v. Tamayo-Reyes*, 504 U.S. 1, 112 S.Ct. 1715, 1719 (1992) (factual basis). Additionally, the petitioner must have specifically told the state court that he was raising a federal constitutional claim. *Duncan*, 513 U.S. at 365-66, 115 S.Ct. at 888; *Keating v. Hood*, 133 F.3d 1240, 1241 (9th Cir.1998).

As set forth above, petitioner did not file a direct appeal from his judgment of conviction. Petitioner’s state habeas corpus petition contained a single claim for ineffective

1 assistance of counsel. Exhibit 30. This court therefore finds that petitioner has not presented
2 grounds one and two to the Nevada Supreme Court and that these grounds for relief are thus
3 unexhausted.

4 Respondents further move to dismiss grounds one and two on the basis that they fail
5 to state a federal question. In ground one, petitioner contends that his sentence is excessive pursuant
6 to Nev. Rev. Stat. 193.330. (Docket 7, p. 3.) In ground two, petitioner contends that the knife used
7 in the commission of his crime is not a “deadly weapon” under Nev. Rev. Stat. 193.165. (Docket #,
8 p. 5.) Habeas corpus relief pursuant to 28 U.S.C. § 2254 is available only on the ground that the
9 state prisoner is in custody in violation of the Constitution or laws or treaties of the United States.
10 28 U.S.C. § 2254(a). Habeas corpus relief is not available to correct alleged errors in the state court's
11 application or interpretation of state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 480
12 (1991); *Middleton v. Cupp*, 768 F.2d 1083, 1084-85 (9th Cir.1985). As respondents argue, petitioner
13 has not raised a federal basis for relief in either ground one or ground two. Thus, this court cannot
14 grant relief on either of these two grounds. It would therefore be fruitless for this court to allow
15 petitioner to return to state court to exhaust grounds one and two.

16 Finally, respondents move to dismiss ground three on the ground it is procedurally
17 barred. Ground three contains a claim of ineffective assistance of appellate counsel. As set forth
18 above, the Nevada Supreme Court found that ground three was procedurally barred.

19 “Procedural default” refers to the situation where a petitioner in fact presented a claim
20 to the state courts but the state courts disposed of the claim on procedural grounds, instead of on the
21 merits. A federal court will not review a claim for habeas corpus relief if the decision of the state
22 court regarding that claim rested on a state law ground that is independent of the federal question and
23 adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

24 The *Coleman* Court stated the effect of a procedural default, as follows:

25 In all cases in which a state prisoner has defaulted his federal claims in
26 state court pursuant to an independent and adequate state procedural
rule, federal habeas review of the claims is barred unless the prisoner
can demonstrate cause for the default and actual prejudice as a result of

1 the alleged violation of federal law, or demonstrate that failure to
2 consider the claims will result in a fundamental miscarriage of justice.

3 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). The procedural
4 default doctrine ensures that the state's interest in correcting its own mistakes is respected in all
5 federal habeas cases. *See Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003).

6 To demonstrate cause for a procedural default, the petitioner must be able to "show
7 that some *objective factor external to the defense* impeded" his efforts to comply with the state
8 procedural rule. *Murray*, 477 U.S. at 488 (emphasis added). For cause to exist, the external
9 impediment must have prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499
10 U.S. 467, 497 (1991).

11 With respect to the prejudice prong of cause and prejudice, the petitioner bears:
12 the burden of showing not merely that the errors [complained of]
13 constituted a possibility of prejudice, but that they worked to his actual
and substantial disadvantage, infecting his entire [proceeding] with
errors of constitutional dimension.

14 *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989), *citing United States v. Frady*, 456 U.S. 152, 170
15 (1982). If the petitioner fails to show cause, the court need not consider whether the petitioner
16 suffered actual prejudice. *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982); *Roberts v. Arave*, 847 F.2d
17 528, 530 n.3 (9th Cir. 1988).

18 In addition, a petitioner can avoid the application of the procedural default doctrine by
19 demonstrating that the federal court's failure to consider his claims will result in a fundamental
20 miscarriage of justice. To prove a "fundamental miscarriage of justice," petitioner must show that
21 the constitutional error of which he complains "has probably resulted in the conviction of one who is
22 actually innocent." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citing *Murray v. Carrier*,
23 477 U.S. at 496).

24 In affirming the decision of the district court denying ground one of the petition for
25 writ of habeas corpus, the Nevada Supreme Court cited NRS 34.810(1)(b)(2). The Ninth Circuit
26 Court of Appeals has held that the timeliness bar applied in this case - - NRS 34.726 - - is an

1 independent and adequate state ground for finding procedural default. *Loveland v. Hatcher*, 231
2 F.3d 640, 642 (9th Cir. 2000). The court finds that in opposing respondents' motion to dismiss,
3 petitioner has shown neither cause and prejudice or a fundamental miscarriage of justice related to
4 his failure to timely raise ground three in the state courts. Accordingly, this court finds that ground
5 three is procedurally barred and will not address it.

6 In order to proceed with an appeal, petitioner must receive a certificate of
7 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435
8 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir.
9 2001). Generally, a petitioner must make "a substantial showing of the denial of a constitutional
10 right" to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529
11 U.S. 473, 483-84 (2000). "The petitioner must demonstrate that reasonable jurists would find the
12 district court's assessment of the constitutional claims debatable or wrong." *Id.* (*quoting Slack*, 529
13 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating
14 that the issues are debatable among jurists of reason; that a court could resolve the issues differently;
15 or that the questions are adequate to deserve encouragement to proceed further. *Id.*

16 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing
17 Section 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in
18 the order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a
19 notice of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has
20 considered the issues raised by petitioner, with respect to whether they satisfy the standard for
21 issuance of a certificate of appealability, and determines that none meet that standard. The Court
22 will therefore deny petitioner a certificate of appealability.

23
24 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss is
25 **GRANTED**. (Docket # 9.) Grounds one and two of this petition for writ of habeas corpus are
26 dismissed for failure to state a claim upon which relief can be granted. Ground three is dismissed as

1 procedurally barred.

2 **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**.

3 **IT IS FURTHER ORDERED** that the clerk of the court shall enter judgment
4 accordingly and shall close this case.

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8 DATED this 26th day of August, 2010.

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10 UNITED STATES DISTRICT JUDGE
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